

82-961
NO. 82

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF SOUTH DAKOTA, EX REL.,
AURORA COUNTY, ET AL.,

Petitioner,

v.

RICHARD B. OLGILVIE AS TRUSTEE
OF THE CHICAGO, MILWAUKEE,
ST. PAUL AND PACIFIC
RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MARK V. MEIERHENRY
ATTORNEY GENERAL
State Capitol
Pierre, South Dakota 57501-5090
Telephone (605) 773-3215

Counsel for Petitioner

QUESTION PRESENTED

Should the general rule against setoff by unsecured creditors in reorganization plans under § 77 of the Bankruptcy Act, established by the case of Baker v. Gold Seal Liquors, 417 U.S. 467 (1974), be rigidly applied to include secured governmental tax creditors?

LIST OF PARTIES

The following counties, all being political subdivisions of the State of South Dakota, were parties in the proceeding before the Court of Appeals for the Seventh Circuit, and said counties are represented by Petitioner, State of South Dakota:

| | |
|-------------|------------|
| Aurora | Jones |
| Beadle | Kingsbury |
| Bon Homme | Lake |
| Brown | Lincoln |
| Brule | Lyman |
| Campbell | McCook |
| Charles Mix | McPherson |
| Clark | Marshall |
| Clay | Meade |
| Corson | Miner |
| Davison | Minnehaha |
| Day | Moody |
| Dewey | Pennington |
| Douglas | Perkins |
| Edmunds | Roberts |
| Faulk | Sanborn |
| Grant | Spink |
| Hamlin | Turner |
| Hanson | Union |
| Hutchinson | Walworth |
| Jackson | Yankton |
| Jerauld | Ziebach |

TABLE OF CONTENTS

| | <u>PAGE</u> |
|---|-------------|
| QUESTION PRESENTED | i |
| LIST OF PARTIES | ii |
| TABLE OF AUTHORITIES | iv |
| OPINION BELOW | v |
| JURISDICTIONAL STATEMENT | 1 |
| STATUTES INVOLVED | 2 |
| STATEMENT OF THE CASE | 3 |
| REASONS FOR GRANTING THE PETITION | 6 |
| I. THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT. | 6 |
| II. THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAS IMPROPERLY APPLIED LAW ESTABLISHED BY THIS COURT. | 10 |
| CONCLUSION | 11 |
| APPENDIX | |

TABLE OF AUTHORITIES

PAGE

CASES

Baker v. Gold Seal Liquors, 417 U.S. 467,
473, 474, 94 S.Ct. 2504, 41 L.Ed.2d 243
(1974) PASSIM

Matter of Central Railroad Company of
New Jersey, 579 F.2d 804 (3d Cir.
1978) 8, 9

United States v. Key, 397 U.S. 322, 90 S.Ct.
1049, 25 L.Ed.2d 340 (1970) 9

STATUTES

SDCL 10-19-1 5

SDCL 10-28-1 5

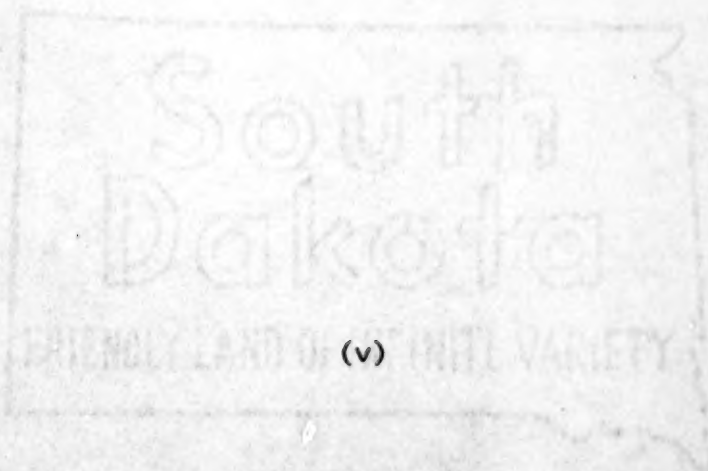
OTHER REFERENCES

28 U.S.C. § 1254 2

11 U.S.C. § 205 2, 3

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit appears in the appendix (Appendix A, pp. A-1 to A-9).



NO. 82-

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF SOUTH DAKOTA, EX REL., ET AL.,
Petitioner,

v.

RICHARD B. OLGILVIE AS TRUSTEE
OF THE CHICAGO, MILWAUKEE,
ST. PAUL AND PACIFIC
RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JURISDICTIONAL STATEMENT

On September 3, 1982, the Seventh Circuit
Court of Appeals in Chicago entered judgment and

filed an Order affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division wherein in an order dated January 14, 1980, the District Court had granted Respondent's Motion for Summary Judgment and had denied the relief requested in Petitioner's Complaint.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254 and Rules of the Supreme Court No. 20 (1980).

STATUTES INVOLVED

11 U.S.C. § 205 [§ 77 of the Bankruptcy Act]

The relevant portions of the South Dakota Codified Laws are as follows:

SDCL 10-19-1. All taxes shall become due on the first day of January of the year following that in which such taxes are assessed, and as between vendor and vendee shall become a lien upon real property on and after such date.

SDCL 10-28-1. All property, real and personal belonging to any railroad company in this state actually and necessarily used in the operation of its line or lines of railway in this state

shall be considered as "operating property," and shall be assessed for the purposes of taxation by the secretary of revenue, and not otherwise.

STATEMENT OF THE CASE

On December 20, 1977, the United States District Court for the Northern District of Illinois issued an order in the matter of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company. This order was issued in the course of proceedings for railroad reorganization pursuant to 11 U.S.C. § 205. The order enjoined all persons and other entities from, inter alia, claiming or taking any setoff of any obligation owing to the Chicago, Milwaukee, St. Paul and Pacific Railroad Company against any claim owed by the Chicago, Milwaukee, St. Paul and Pacific Railroad Company. The Petitioner, in May of 1979, commenced the present action in the District Court, seeking relief from the District Court's injunction against setoff.

The Respondent filed a Motion for Summary Judgment, and that motion was granted by the District Court in a decision dated December 5, 1979. The Petitioner's Motion to Reconsider the decision of December 5, 1979, was denied by the District Court on January 11, 1980.

Petitioner then appealed the District Court's decision to the United States Court of Appeals for the Seventh Circuit. On September 3, 1982, the Court of Appeals for the Seventh Circuit entered its judgment and order affirming the judgment of the District Court.

The factual dispute in this case is based on the Chicago, Milwaukee, St. Paul and Pacific Railroad Company having made overpayments on South Dakota real property taxes during 1969 and 1970. Because of these overpayments, the South Dakota counties for whose benefit this action is brought are indebted to the Chicago, Milwaukee, St. Paul and Pacific Railroad Company. Conversely, the Chicago, Milwaukee, St. Paul and

Pacific Railroad Company is indebted to the South Dakota counties in whose name this action was brought for 1977, 1978, 1979, 1980, 1981 and 1982 taxes imposed on the Railroad's "operating property" pursuant to Chapter 10-28-1 of South Dakota Codified Laws. Furthermore, the Railroad's failure to pay taxes assessed triggered the provisions of § 10-19-1 of the South Dakota Codified Laws, which section reads as follows:

All taxes shall become due on the first day of January of the year following that in which such taxes are assessed, and as between vendor and vendee shall become a lien upon real property on and after such date.

This action was originally brought on in the District Court to allow the South Dakota counties for whose benefit this action is brought to set off the delinquent taxes now due and owing to the counties from the Chicago, Milwaukee, St. Paul and Pacific Railroad Company against any amounts which the counties owe to the Railroad by reason of tax overpayments.

REASONS FOR GRANTING THE PETITION

I

THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

In Baker v. Gold Seal Liquors, 417 U.S. 467, 94 S.Ct. 2504, 41 L.Ed.2d 243 (1974), the Trustees of the Penn-Central Transportation Company, acting under § 77 of the Bankruptcy Act, brought suit to recover freight charges from Gold Seal Liquors. Gold Seal, in turn, counter-claimed, seeking to set off damages for loss and damage to shipments over the bankrupt debtor's line. Gold Seal Liquors apparently made no claim to any entitlement of priority, and made no claim of any secured or lien status. The Court held that a setoff should be denied, concluding that to the extent a setoff would have been allowed, it would have granted a preference to the claim of .

Gold Seal Liquors over others by the happenstance that Gold Seal Liquors owed freight charges that other creditors did not. 417 U.S. 467 at 474. The majority opinion's reasoning is best exemplified by the following statement found at 417 U.S. 473:

Secured creditors have by law a priority in the hierarchy. Unsecured creditors usually are pooled together. They may receive new securities, perhaps stock. Allowance of a setoff that reduces all or part of the Debtor's claim against them is a form of priority. [Emphasis added].

Petitioners respectfully submit that the underscored word "them" in the above-cited passage clearly refers to unsecured creditors, and that therefore, it is clear that the Court was applying its reasoning to unsecured creditors only. The counties represented by the Petitioner herein are secured tax lien creditors by virtue of the operation of South Dakota law, as set forth above. Petitioner respectfully submits that the Court of Appeals for the Seventh Circuit has, by

affirming the decision of the District Court, violated the principle set forth by this Court in Baker v. Gold Seal Liquors, supra. In its decision affirming the District Court the Court of Appeals for the Seventh Circuit has effectively held that the general rule against allowance of setoffs, established by Baker v. Gold Seal Liquors, applies to secured tax lien creditors as well as unsecured creditors.

The Petitioner, therefore, concludes that the Court of Appeals for the Seventh Circuit has incorrectly claimed that this Court's ruling in Baker v. Gold Seal Liquors, prohibits, as a general rule, setoffs of mutual debts by secured creditors.

The fundamental rule for a reorganization plan under § 77 of the Bankruptcy Act is that the plan must be "fair and equitable." It is clear that a plan, in order to be "fair and equitable," must insure that creditors with priority are in fact treated as such. In the case of Matter of

Central Railroad Co. of New Jersey, 579 F.2d 804

(3rd Cir. 1978), it was stated:

The priority standard [of § 77] requires that creditors and claimants of a bankrupt estate of the same class receive the full value of their debts from the property of the debtor before junior creditors and shareholders are paid. [Citing Baker v. Gold Seal Liquors, 417 U.S. at 473-474 (1974) 579 F.2d 804 at 810].

This Court, in the case of United States v. Key, 397 U.S. 322, 90 S.Ct. 1049, 25 L.Ed.2d 340 (1970) noted that no plan which compromises the rights of senior creditors in order to protect junior creditors can be found to be "fair and equitable." 397 U.S. 322 at 327.

The order of the Court of Appeals for the Seventh Circuit, in the instant case, strikes too broadly under the rule announced by this Court in Baker v. Gold Seal Liquors, supra, and under the principles of fairness and equitableness required by § 77 of the Bankruptcy Act.

Petitioner respectfully submits that the question of whether this Court's general rule

against the allowance of setoffs in proceedings under § 77 of the Bankruptcy Act should be applied to secured creditors is an important question of federal law which has not been, but should be, settled by this Court.

II

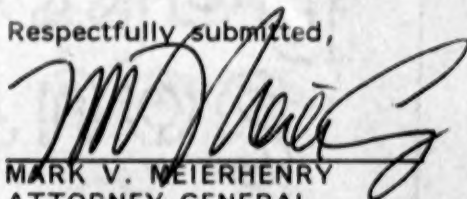
THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT
HAS IMPROPERLY APPLIED LAW ES-
TABLISHED BY THIS COURT.

The United States Court of Appeals for the Seventh Circuit has, in its decision affirming the District Court herein, erroneously claimed that this Court's ruling in Baker v. Gold Seal Liquors, supra, establishes a blanket prohibition against setoffs by both unsecured and secured creditors in proceedings under § 77 of the Bankruptcy Act. In so doing, the Court of Appeals for the Seventh Circuit has improperly applied the law, as established by this Court in Baker v. Gold Seal Liquors, supra.

CONCLUSION

Based on the foregoing arguments and authorities, the State of South Dakota prays that its Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit be granted.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'M. Meierhenry', is written over a horizontal line.

MARK V. MEIERHENRY
ATTORNEY GENERAL
State Capitol
Pierre, South Dakota 57501-5090
Telephone: (605) 773-3215
Counsel for Petitioner